SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1961.

No. 327

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

INTERSTATE COMMODITIES, INC.,
Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1961

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Supreme Court of the United States

OCTOBER TERM, 1961.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

INTERSTATE COMMODITIES, Inc.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

To the Supreme Court of the United States:

The petition of The New York Central Railroad Company respectfully shows:

Opinions Below

The opinion of the United States District Court for the Northern District of New York is reported at 181 Fed. Supp. 228 and is printed at pages 4a-14a of Petitioner's Appendix in the Court of Appeals for the Second Circuit.

The opinion of the Court of Appeals is not yet reported. Copy thereof is appended hereto.

Certified copy of the appendices filed by all parties below together with the proceedings in the court below and nine copies of such appendices are filed herewith.

Grounds on Which the Jurisdiction of This Court is Invoked

The date of the judgment sought to be reviewed and the time of its entry is June 5, 1961 (R. 117a-118a).

The statutory provision conferring on this court jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is 28 U. S. Code, Section 1254(1).

Questions Presented for Review

Did the District Court, by denying petitioner's motion for judgment over against respondent after the jury had returned a special verdict in the form of answers to questions submitted by the court under Rule 49(a) of the Rules of Civil Procedure, err in disregarding the jury's finding that the negligence of petitioner was passive and in directing judgment dismissing petitioner's cross-claim against respondent; and did the Circuit Court of Appeals err in affirming such judgment?

Federal Rule of Civil Procedure

The case involves Rule 49 of the Rules of Civil Procedure, copy of which is appended hereto.

Statement of the Case

The Pleadings

Francis T. Ratigan, in the employ of petitioner as a brakeman at Troy, New York, instituted an action against petitioner in the District Court under the Federal Employers' Liability Act (45 U. S. Code, Sections 51 *et seq.*) to recover for injuries sustained by him on October 23, 1957, when he came in contact with a canopy extending

over respondent's private sidetrack while a freight car upon which he was riding was moved by petitioner onto the siding (Respondent's Appendix 11a).

Petitioner brought in respondent and The Troy Union Railroad Company as third-party defendants in said action, making claim over against respondent by a first cause of action (Respondent's Appendix 1a) claiming indemnity for the amount of any judgment Ratigan might recover against it upon the basis that if there were any negligence on the part of petitioner, it was passive in nature and that the accident had been caused by reason of the active negligence of respondent in constructing the canopy so close to respondent's sidetrack as to constitute a hazard to the employees of petitioner while using such siding in placing cars thereon, or removing cars therefrom, for the use and benefit of respondent; and claiming such indemnity further on a second cause of action (Respondent's Appendix 4a) as the third-party beneficiary of an indemnity agreement entered into by respondent's assignor and The Troy Union Railroad Company, whose tracks were used by respondent in placing cars upon the siding and removing cars therefrom.

Petitioner's third-party complaint against The Troy Union Railroad Company is not here involved nor is the judgment recovered by Ratigan against petitioner upon the jury's verdict of $70.000, as petitioner's right to recover over against respondent is the sole basis for the review sought in this court.

The Facts

The tracks of The Troy Union Railroad Company are all located in the City of Troy and are used by three different operating railroads, one of which is the petitioner, who pay nothing to the Troy Union for the privilege of operating on its tracks but, together, pay the expenses of

the Troy Union in the same proportion as they respectively own its capital stock. The Troy Union owns no engines or rolling stock, employs no conductors, engineers, firemen or brakemen, its entire operation consisting of ownership of the tracks and the employment of a station-master, several crossing watchmen and signal operators (Petitioner's Appendix 52a-53a).

The Troy Union some years prior to the accident had entered into an agreement concerning the industrial sidetrack upon which the accident happened, which by various mesne assignments was transferred to the respondent which agreed to assume all of the obligations imposed by that agreement upon the owner of the sidetrack, including the agreement to indemnify and hold the Troy Union harmless from any liability resulting from injury to any person by reason of the presence or maintenance of structures or obstructions encroaching within or upon standard clearances (Respondent's Appendix 39a) which were expressly defined in the agreement (Respondent's Appendix 4a-6a). Nevertheless, the respondent erected the canopy with which Ratigan collided within, and encroaching upon, the standard clearances.

The Trial

The District Judge submitted the case to the jury which rendered a general verdict on Ratigan's claim against petitioner, and pursuant to Rule 49(a) submitted questions to the jury which, together with the jury's answers, are set forth at pages 95a-96a of Petitioner's Appendix and at pages 21-22 *infra*, whereby he required the jury to answer such questions as the basis for determining judgment upon petitioner's cross-claims against respondent. The answers made by the jury to questions 7 and 8 were that the petitioner was guilty only of passive negligence, whereas respondent was guilty of both active and pas-

sive negligence. The jury also found in its answer to question 1 that respondent had been guilty of negligence in erecting the canopy. By virtue of the jury's answers to the questions, petitioner was entitled to recover over against respondent (*McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, 328-331; *Putvin v. Buffalo Electric Co.*, 5 N. Y. 2d 447, 453-455). The jury in answer to question 3 also found that petitioner knew or should have known of the existence of the canopy previous to the accident, but the answer did not disclose whether it had actual knowledge or mere constructive notice; and constructive notice alone such as "failure to perform a nondelegable type of duty * * * to furnish the injured party with a safe place to work * * * constitutes passive negligence entitling one to indemnity" (*Putvin, supra*, p. 456); and "there is a right of recovery over, against a primary wrongdoer whose misconduct has created a dangerous condition, by one who has been held liable for failure to discover and remedy the danger * * *" (*Putvin*, p. 457). "A typical case admissible within the area of liability over arises where one party negligently actuates a danger for which a second party may be liable to an injured person because, having a special relationship to the injured person, he failed to recognize and avert the danger. If he is required to pay damages for not noticing and correcting the danger, he is allowed to recover against the first and primary party in the negligence situation" (*Anderson v. Liberty Fast Freight Co.*, 285 App. Div. 44, 45-46).

Upon the return of the verdict, petitioner moved for judgment over against respondent on both causes of action against respondent in the third-party complaint (Petitioner's Appendix 97a-98a), which motion was denied and the third-party complaint dismissed (Petitioner's Appendix 14a).

Upon petitioner's appeal to the Court of Appeals, the judgment recovered by Ratigan against petitioner was af-

firmed (as to which no question is raised herein), as was the judgment in favor of respondent dismissing the third-party claims. There was a dissent by one of the Circuit Judges from the affirmance of the dismissal of the cross-claims, Judge Friendly writing a dissenting opinion in which he contended that a new trial should be granted on petitioner's first cross-claim against respondent because the affirmance deprived petitioner of its right to a jury trial.

The Reasons Why the Writ Should be Granted

1. The majority of the Court of Appeals held that "(t)here is a manifest inconsistency between the answers to questions 5 and 6 on the one hand, and the answer to question 7 on the other" but that "the answer to question 7 could be disregarded 'as surplusage.'" Yet, there is no provision in Rule 49(a) for disregarding the answer to a special question. Under 49(b) a general verdict (not taken here insofar as the cross-claims are concerned) may be disregarded, if inconsistent with the answers to special questions. But even under 49(b), if the answers to special questions are inconsistent with the general verdict *and with each other,* the court "shall not direct the entry of judgment" but *must* either return the jury for further consideration or order a new trial, all as pointed out in the dissenting opinion, from which Judge Friendly rationalized that "the evident sense" of the rule is that "when the answers are inconsistent (as the majority held), disregard of any would be a denial of jury trial."

(a) The granting of certiorari is justified because "(m)aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of

the right to a jury trial should be scrutinized with the utmost care" (*Dimick v. Schiedt*, 293 U. S. 474, 486; *Beacon Theatres v. Westover*, 359 U. S. 500, 501).

(b) Even Rule 50(b) giving courts, under certain circumstances, the right to enter judgment *n. o. v.* "has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law" (*Berry v. U. S.*, 312 U. S. 450, 453).

(c) "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable" (*Tennant v. Peoria Ry.*, 321 U. S. 29, 35).

2. There is a conflict in the holdings of the various circuits whether under Rule 49 the form of special questions is confined to the strict limited sense of "fact" as held by the Second Circuit here, finding support therefor in *Cate v. Good Bros., Inc.*, 181 Fed. 2d 146, 149 (3rd C. C. A.) and *Thedorf v. Lipsey*, 237 Fed. 2d 190, 193 (7th C. C. A.), (cf. also *Carpenter v. B. & O. R. R.*, 109 Fed. 2d 375, 379 [6th C. C. A.]) or may be phrased in the broader sense of mixed questions of law and fact as held in *Jackson v. King*, 223 Fed. 2d 714, 718 (5th C. C. A.); *McDonnell v Timmerman*, 269 Fed. 2d 54, 58 (8th C. C. A.); *A. M. Webb & Co. v. Robert P. Miller Co.*, 78 Fed. Supp. 24, 27 (E. D. Pa.) reversed on other grounds, 176 Fed. 2d 578 (3rd C. C. A.); and *McCandless v. DeFelice & Son, Inc.*, 144 Fed. Supp. 462, 464 (W. D. Pa.).

The majority below treated the answer to question 7 as surplusage because it considered the question submitted in that form as one of law. It was, however, *the* question of ultimate fact, which the Trial Court stated (Petioner's Appendix 7a) under *McFall v. Compagnie Mari-*

time Belge, 304 N. Y. 314, 328 and *Banks v. Central Hudson Gas & Electric Corp.,* 224 Fed. 2d 631, was for the jury to determine. Asking whether there was active or passive negligence is no different as a question of fact than asking whether there was negligence as in questions 4 and 5. In a contract action a jury could be asked whether a party paid consideration or in an automobile collision case whether the driver of the car was negligent as long as the jury is instructed what may constitute consideration in the one and negligence in the other. Here the jury was fully instructed as to the meaning of active and passive negligence (Petitioner's Appendix 57a-88a), so its answer was the decision of a question of fact.

3. This court, never having passed upon the proper use of Rule 49, should construe it as a guide to the trial of cases in the Federal District Courts.

(a) "The importance of a decision by this court, respecting the proper practice under Rule 50(b), and a conflict of decisions, moved us to grant certiorari" (*Montgomery Ward v. Duncan,* 311 U. S. 243, 247).

(b) Where "an important question of judicial administration" is raised certiorari should be granted (*Sprague v. Ticonic Bank,* 307 U. S. 161, 162).

(c) "We granted certiorari to settle the important question of practice presented under the Rules of Civil Procedure" (*Leishman v. Associated Electric Co.,* 318 U. S. 203, 205).

(d) "Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation. That is what is involved in this case. The immediate issue is the construction of one of the important Rules of Civil Procedure" (Dissenting Opinion *Johnson v. N. Y., N. H. & H. R. R. Co.,* 344 U. S. 48, 55).

4. The courts below failed to apply decisions of this court and applicable state law.

The second cause of action asserted by petitioner against respondent was grounded upon the claim that indemnity was due because it was a third-party beneficiary in the contract between respondent and The Troy Union Railroad Company (*Lawrence v. Fox*, 20 N. Y. 268; *Rigney v. N. Y. C. R. R. Co.*, 217 N. Y. 31; *Seaver v. Ransom*, 224 N. Y. 233; *Filardo v. Foley Bros.*, 297 N. Y. 217, 225; *Restatement of Law of Contracts*, Sec. 133).

The Court of Appeals held "that on the record before us this was a question of law for the court and we find nothing in the New York cases to warrant a holding that the indemnity clause was intended to benefit the New York Central or its employees." But as the Troy Union, the promisee under the indemnity contract, operated no trains and had no operating employees, the contract meant nothing unless it protected the New York Central, as well as the other two operating railroads, while using Interstate's siding. "If the promise was not for them, it was without significance or reason" (Cardozo, Ch. J., in *Strong v. American Fence Const. Co.*, 245 N. Y. 48, 53). The fact that the New York Central was not a party to, nor mentioned in, the indemnity agreement did not preclude it from being a third-party beneficiary under the rule as set forth in Section 133 of the Restatement of the Law of Contracts, as held by this court in *Waterman Co. v. Dugan & McNamara*, 364 U. S. 421, and *Crumady v. The J. H. Fisser*, 358 U. S. 423. The fact that there may be "nothing in the New York cases" did not relieve the Court of Appeals from deciding that the rule set forth in the Restatement Section 133 is the law of New York and the proper rule to apply.

Section 133 of the Restatement of the Law of Contracts is the law in New York as shown by *Filardo v. Foley Bros.*, 297 N. Y. 217, 225-226 and cases therein cited. (While

Filardo was reversed by this court, it was upon another ground which made it "unnecessary to decide • • • the third-party beneficiary" question. 336 U. S. 281, 290-291.) See also *McClare v. Mass. Bonding & Ins. Co.*, 266 N. Y. 371 at page 379 wherein it is indicated that the highest court in New York, which decided *Lawrence v. Fox*, has embraced, wholeheartedly, the third-party beneficiary doctrine.

In both *Waterman* and *Crumady* this court held that the right to indemnification for breach of the contract extended to one not a party to the contract. The Court of Appeals failed to follow the third-party beneficiary rule of those cases and "decided an important state • • • question in a way in conflict with applicable state • • • law" (Rule 19).

WHEREFORE, petitioner prays that a writ of certiorari be directed to the United States Circuit Court of Appeals for the Second Circuit in this action in order that the errors of which petitioner complains may be reviewed and corrected by this court.

Dated: August 7, 1961.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner.

By: Charles E. Nichols,
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EARL H. GALLUP, JR.,
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Opinions of Court of Appeals

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 300—October Term, 1960.

(Argued April 13, 1961 Decided June 5, 1961.)

Docket No. 26217

FRANCIS T. RATIGAN,

Appellee,

against

NEW YORK CENTRAL RAILROAD CO.,

Appellant,

against

INTERSTATE COMMODITIES, Inc.,

Appellee,

and

THE TROY UNION RAILROAD COMPANY,

Appellee-Appellant.

Before:

CLARK, MEDINA and FRIENDLY,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York, James T. Foley, Judge.

Defendant New York Central Railroad Co. appeals from a judgment entered on a jury verdict for plaintiff in an action under the Federal Employers' Liability Act, 45 U. S. C. Sections 51 *et seq.*, and from a judgment in the same action dismissing its several cross-claims against Interstate Commodities, Inc. and Troy Union Railroad Company. Troy Union Railroad Company also asserts a protective appeal in the event of a reversal of the dismissal of New York Central Railroad's cross-claim against it. Opinion below reported at 181 F. Supp. 228. Affirmed.

J. Murray Dunn, Syracuse, New York (McElroy, Young, Martin & Dunn, Syracuse, New York, on the brief), for appellee Francis T. Ratigan.

Earl H. Gallup, Jr., Albany, New York (Whalen, McNamee, Creble & Nichols, Albany, New York, on the brief), for appellant.

M. James Conboy, Albany, New York (Edward L. Bookstein, James S. Carter, John W. Cebula, James M. Conboy and Carter & Conboy, Albany, New York, on the brief), for appellee Interstate Commodities, Inc.

Jerome H. Shapiro, New York, N. Y. (Gerald E. Dwyer, New York, N. Y., on the brief), for appellee-appellant The Troy Union Railroad Company.

MEDINA, Circuit Judge:

On October 23, 1957 at about 3 A. M., Francis T. Ratigan, a brakeman employed by New York Central Railroad Company, was struck by an overhanging canopy on premises owned by Interstate Commodities, Inc. as he was about to descend from the top of a freight car to operate the brake and bring the car to a standstill. In his action against New York Central a verdict of $70,000.00 was rendered in his favor and the New York Central appeals. In its answer the New York Central asserted three cross-claims: (1) against Interstate for recovery over on the

theory that Interstate was guilty of active negligence in the construction of the canopy in such manner that it projected over the rails of the track, whereas the negligence of New York Central was at most passive only; (2) against Interstate for indemnity pursuant to a contract between Interstate's assignor and Troy Union Railroad Company the terms of which had been made binding on Interstate, on the theory that New York Central and its employees were beneficiaries of the contract, although not named therein; and (3) against Troy Union, in the event of the rejection of the other cross-claims, on the theory that Troy Union was acting as New York Central's agent and was under a duty to require Interstate to include in the contract indemnity to New York Central and its employees for damage suffered by breach of the terms of the contract relative to the construction of overhanging canopies. These claims were all dismissed by the trial judge and New York Central appeals from the judgment of dismissal. By way of protection, in the event of a reversal of so much of the judgment as dismisses the cross-claim against it, Troy Union also appeals in support of a cross-claim of its own against Interstate, for indemnity under the contract if New York Central should recover against it. Judge Foley's opinion is reported at 181 F. Supp. 228.

The factual background is far from complicated and each of the several separate issues is simple enough. The principal difficulty has its source in the answers of the jury to a series of questions formulated by the trial judge as the basis for a special verdict under Rule 49(a) of the Federal Rules of Civil Procedure. For the sake of clarity we shall first discuss together the claim of Ratigan against the New York Central, based upon active as well as passive negligence, and the first cross-claim of New York Central against Interstate whose negligence in the construction of the overhanging canopy would seem clearly to be active, under the law of New York which controls

the substantive features of the cross-claims. Later, we shall come to the second and third cross-claims and they will not detain us long.

The scene of the accident is the siding adjacent to the Interstate property where freight cars were loaded and unloaded with merchandise coming to or going from the Interstate premises. Alongside the siding was the main Troy yard with its several tracks. Ratigan worked on the midnight to eight A. M. shift and there were five men in the crew, a conductor Bazar, an engineer, a fireman and two brakemen, one of whom was Ratigan. As these five men were riding the engine and approaching the switch leading to the Interstate siding there was a freight car attached to the rear end of the engine and there were five or six other freight cars on the siding. The instructions given by the yardmaster to the conductor, who was in charge of the operation, were to put the freight car that was attached to the engine up at the end of the siding furthest away from the switch, what Ratigan called "the hind end of the track," and then place the other cars at various locations on the siding convenient to the Interstate doors where the loading or unloading was to take place. This made it necessary first to pull out the five or six cars already on the siding, take them to the adjacent main track and leave them there, after which the one freight car already attached to the engine could be placed in its intended position at the further end of the siding. It was the duty of Lasky, the other brakeman, to stay near the engine and tend the switch; Ratigan was to pass signals along between Bazar and the engineer. The men were used to working together but the man in charge was definitely Bazar.

The first thing they did was to open the switch and back down into the siding where they coupled the five or six freight cars to each other and to the single car already attached to the engine. Then the engine and the string of freight cars were brought up past the switch and the five

or six cars "kicked" up the main track. There was a slight grade running in the direction of the engine. Bazar testified he told Ratigan "to watch the cars so they would not roll back," and Ratigan put a block of wood under the one nearest the engine as they came to a stop. Ratigan signalled when they were clear of the switch and Bazar signalled to the engineer to "kick" the one car "back into the siding" and Lasky threw the switch. The men had lanterns and all the signals were given by moving these lanterns in various ways.

As we approach the critical moment Ratigan is at least six car lengths or 250 feet away from the engine, according to Bazar, and he gets no instructions whatever from Bazar, who, without communicating in any way with Ratigan, has decided that he will himself take care of braking the single freight car as it proceeds up the siding at about four miles an hour. Accordingly, Bazar, who was on the freight car when it was "kicked" off, remained on the freight car. The brake which operated as a wheel attached to the end of the car was at Bazar's end. So Bazar started to wind up the brake in a crouching position with his lantern on the brake step where Ratigan could not see it. In the meantime, not receiving any instructions from Bazar and assuming that he was supposed to brake the car, Ratigan boarded the moving car at the other end, climbed up to the top, walked along the catwalk on top of the car, and was on his hands and knees, reaching down for the ladder with his left foot, having placed his lantern on top of the car, when he was hit in the head by the end of the projecting canopy and thrown to the ground. Bazar did not know Ratigan was there until the very moment of the accident and he did not expect Ratigan to be there. And the same can be said the other way around, Ratigan did not expect Bazar to be where he was and he said he had no reason to expect him to be there. And all this was in darkness, although the men accustomed to this work could see well enough to get around.

There is also evidence, but not much, from which the inference might be drawn by the jury that the proper way to bring a single car into position on the siding was to keep it attached to the engine rather than to "kick" it in. Thus Bazar testified that if this single freight car was the only one to be put in the siding the proper way to do it was to back it in coupled to the engine. While he insisted this method was not to be used when there were several other freight cars to be put on the siding later, the jury may have rejected this qualification, especially as one of the Interstate officials testified he had repeatedly seen single cars backed into the siding attached to the engine and had never seen an instance where one was "kicked" in.

Had the action been brought by Ratigan against Interstate we have no doubt the jury would have found in Ratigan's favor, on this record. And this is so, quite apart from the specific terms of the sidetrack agreement of March 8, 1937 between Interstate's assignor and Troy Union, which requires industry to keep the "track clear of obstructions" and prohibits any temporary or permanent structures "within the space of 8 feet, 4 inches on either side of the center line of said track, or within the space of 22 feet above the said track."

But Ratigan did not sue Interstate, and his claim against New York Central was based upon two counts: (1) that the railroad knew or should have known of the existence of this canopy and was under a duty to cause it to be removed, or at least to warn its employees of the danger; and (2) that the operation of placing the single freight car in the siding was conducted in a negligent manner. While Bazar and Ratigan testified that they had never noticed this particular canopy before and counsel for the railroad claimed the photographs showed it had been erected shortly before the accident, we do not get this impression from the exhibits and there is positive and very convincing proof that the canopy was erected by In-

terstate in July, 1955. In view of the proof of constant use of this siding by New York Central, we think the jury had little difficulty with the first count, despite the testimony of Bazar and Ratigan that they had never noticed the canopy until the time it hit Ratigan in the head.

The case of Ratigan against the railroad was submitted to the jury with instructions covering both counts, and, as will later appear, the jury found there was negligence both by failure to cause the obstruction to be removed or to warn the men, and also in the manner of conducting the switching operation itself, and that in each instance the negligence or breach of duty was a proximate cause of the injuries to Ratigan.

New York Central's Appeal as Against Ratigan

Conceding that there was sufficient evidence of negligence to support the verdict against the railroad on the first count, the New York Central seeks a reversal as against Ratigan on two grounds: (1) that there was not sufficient evidence to sustain a finding of negligence in the manner in which the switching operation was conducted, as charged in the second count, and that the verdict should not be allowed to stand unless supported by proper proof on both counts; and (2) that it was error to refuse a request for an instruction to the jury "that conductor Bazar's presence on the ladder was not a proximate cause of this accident."

But for the alleged inconsistency in some of the answers to the questions formulated by the trial judge, which we shall discuss later, we could dispose of the first contention by merely stating that the jury made a specific finding against the railroad on both counts. In addition, however, we hold the evidence sufficient to establish negligence by the railroad on both counts.

The instructions in chief and certain supplementary instructions in response to a question from the jury after

the commencement of its deliberations, indicated that in deciding whether there was negligence in the method of operation by which the single car was moved to its destination, the jury were to consider "all human and mechanical activities that were involved." They might have concluded that the single car should not have been "kicked" back into the siding but backed in coupled to the engine. They might also have concluded that it was the duty of Bazar to inform Ratigan that Bazar would himself brake the car and that Ratigan should keep off. Bazar was in complete charge of the operation and he knew that it was not necessary to have two men on the car to operate the brake. The confusion or, as the trial judge expressed it in his opinion on the motion for a new trial, "the fumbling of instructions," might very properly be considered by the jury to constitute negligence and a proximate cause of the accident. Had Ratigan been told that Bazar would himself brake the car Ratigan would not have boarded it. Moreover, had Bazar not already commenced to wind the brake wheel and thus to some extent to arrest the forward motion of the car, the jury might well have inferred that the car would have otherwise been well past the canopy by the time Ratigan had reached his crouching position in his attempt to reach the brake and operate it.

The law applicable to this phase of the case is federal law and the Supreme Court has told us in various ways and on numerous occasions that in these FELA cases the railroad employee is to be given the benefit of every doubt. E. g., *Harris v. Pennsylvania R.R.*, 1959, 361 U. S. 15; *Moore v. Terminal R.R. Ass'n*, 1958, 358 U. S. 31; *Honeycutt v. Wabash Ry.*, 1958, 355 U. S. 424; *Stinson v. Atlantic Coast Line R.R.*, 1957, 355 U. S. 62; *Gibson v. Thompson*, 1957, 355 U. S. 18; *Ringhiser v. Chesapeake & Ohio Ry.*, 1957, 354 U. S. 901; *McBride v. Toledo Terminal R.R.*, 1957, 354 U. S. 517; *Arnold v. Panhandle & Santa Fe Ry.*, 1957, 353 U. S. 360; *Rogers v. Missouri Pacific R.R.*, 1957, 352 U. S. 500; *Cahill v. New York, N. H. & H. R.R.*, 1955,

350 U. S. 898; *O'Neill v. Baltimore & Ohio R.R.*, 1955, 348 U. S. 956; *Stone v. New York, Chicago & St. L. R.R.*, 1953, 344 U. S. 407; *Wilkerson v. McCarthy*, 1949, 336 U. S. 53.

The request to charge was misleading and unnecessary. It was properly refused. We cannot perceive how the jury could have thought the mere presence of Bazar on his end of the car was a proximate cause of the accident, and we can draw no inference from the summations as they were not reported and are not before us. It was not only what Bazar did, including the operation of the brake and the giving of orders to the engineer to "kick" the car up the siding, but what he did not do that may well have been considered by the jury to constitute the negligence of the railroad in the switching operation that they found to be "one of the proximate causes" of the accident. He had not given proper instructions to his crew and had not told any of them that he would himself stay on the car and brake it himself.

Accordingly, we conclude that the judgment in favor of Ratigan against the railroad should be affirmed.

Active and Passive Negligence and New York Central's First Cross-Claim

We now come to the interesting part of the case. The substantive features of the cross-claims are controlled by New York law, but the applicable adjective law is, of course, federal. We think it is clear that negligence of the railroad in the conduct of the switching operation itself would be considered by the New York courts to be active negligence. See *Bush Terminal Bldgs. Co. v. Luckenbach Steamship Co.*, decided March 30, 1961, N. Y. Law Journal, May 19, 1961, —— N. Y. 2d ——, —— N. E. 2d ——, —— N. Y. S. 2d ——; *Putvin v. Buffalo Elec. Co.*, 1959, 5 N. Y. 2d 447, 158 N. E. 2d 691, 186 N. Y. S. 2d 15; *McFall v. Compagnie Maritime Belge*, 1952, 304 N. Y. 314, 107 N. E. 2d 691; *Ruping v. Great Atlantic & Pacific Tea Co.*, N. Y.

App. Div., 3d Dep't, 1953, 283 App. Div. 204, 126 N. Y. S. 2d 687. See also *Guarnieri v. Kewanee-Ross Corp.*, 2 Cir., 1959, 263 F. 2d 413, modified on other grounds, 270 F. 2d 575. Negligence of the railroad in failing to cause the canopy to be removed or to warn its employees to watch out for it would probably be considered by the New York courts to be either active or passive negligence depending upon whether the railroad actually knew of its existence and position and acquiesced in it, or merely should have known of it. See *Putvin v. Buffalo Elec. Co., supra; Ruping v. Great Atlantic & Pacific Tea Co., supra.* But the New York courts would beyond peradventure of doubt consider Interstate's construction and maintenance of this dangerous obstruction to be active negligence. See *Putvin v. Buffalo Elec. Co., supra.* Also, according to New York law, there could be no recovery by way of indemnity by the railroad against Interstate if one of the proximate causes of the accident was the active negligence of the railroad. *Tipaldi v. Riverside Memorial Chapel,* N. Y. App. Div., 1st Dep't, 1948, 273 App. Div. 414, 418, 78 N. Y. S. 2d 12, affirmed 298 N. Y. 686, 82 N. E. 2d 585; see *Putvin v. Buffalo Elec. Co., supra,* 5 N. Y. 2d at 445; *Messaro v. Long Island R.R.,* N. Y. App. Div., 2d Dep't, 1948, 274 App. Div. 939.

Despite the New York ruling that what is active and what is passive negligence is, "generally speaking, a question of fact for the jury," *McFall v. Compagnie Maritime Belge, supra,* 304 N. Y. at 328, it would have been entirely proper for the trial judge to formulate questions of fact, as he did in this case, leaving it to himself to draw the legal inferences of active and passive negligence. As a matter of federal procedure it was unnecessary and improper also to submit questions containing the conclusions of law to be drawn from the findings of fact. Cf. *Thedorf v. Lipsey,* 7 Cir., 1956, 237 F. 2d 190, 193; *Cate v. Good Bros., Inc.,* 3 Cir., 1950, 181 F. 2d 146, 149; 5 Moore, Federal Practice, p. 2204. On the other hand, it would have been proper to submit the case to the jury for a general verdict

as was apparently done by the trial court in *Banks v. Central Hudson Gas & Elec. Corp.*, 2 Cir., 1955, 224 F. 2d 631. If this course had been pursued, it would have been necessary to explain as succinctly as possible, and with reference to the claims actually made by the parties, the difference between active and passive negligence.

What the trial judge did was to pursue a middle course. The questions formulated, to which no objection was voiced by any of the parties, and the answers given by the jury are as follows:

> "'1. Did the erection of the canopy adjacent to door 3 by Interstate constitute negligence?
>
> Answer: Yes.
>
> 2. Was the erection of the canopy one of the causes of the accident?
>
> Answer: Yes.
>
> 3. Did the New York Central Railroad Company know or should it have known of the existence and position of the canopy and its extension over a railroad car previous to October 23, 1957?
>
> Answer: Yes.
>
> 4. If your answer to question '3' is 'yes,' then was the New York Central Railroad Company negligent in failing to take any steps to bring about removal of the canopy or notify its employees of its existence?
>
> Answer: Yes.
>
> 5. Did the method of operation by which the New York Central Railroad Company moved the car to its destination on the siding constitute negligence?
>
> Answer: Yes.
>
> 6. Was the method of operation by which the New York Central Railroad Company moved the car to its destination on the siding one of the causes of the accident?
>
> Answer: Yes.

7. Was the New York Central Railroad Company guilty of active or passive negligence, or both?
Answer: Passive.

8. Was Interstate Commodities, Inc., guilty of active or passive negligence or both?
Answer: Both.'"

We think questions 7 and 8 were unnecessary and improper. Having already made the findings of fact in its answers to questions 5 and 6, to the effect that the negligence of the railroad in the method of operation of moving the freight car was "one of the causes of the accident," the jury should have concluded that the railroad was guilty of active negligence. There is a manifest inconsistency between the answers to questions 5 and 6, on the one hand, and the answer to question 7 on the other.

On the motion to set aside the verdict and for a new trial Judge Foley in effect held that it was a mistake to submit the legal questions pertaining to active and passive negligence to the jury because these were "difficult legal principles" and they "gave the jury an unnecessary legal workout which was far beyond their comprehension." We agree with this, although we are frank to say that the legal principles involved could have been more clearly stated. Judge Foley also held that, the facts having been determined by the answers to questions 3, 4, 5 and 6, the erroneous legal conclusion stated in the answer to question 7 could be disregarded "as surplusage." We also agree with this ruling, which we think especially admissible in a case where a special verdict is taken under Rule 49(a). In such a case the trial judge reserves a large measure of control over the judgment to be entered, in the interest of substantial justice between the parties. Cf. *Momand v. Universal Film Exchange, Inc.*, D. C. D. Mass., 1947, 72 F. Supp. 469, 485; *Halprin v. Mora*, 3 Cir., 1956, 231 F. 2d 197.

Thus we conclude that the judgment dismissing the railroad's first cross-claim against Interstate was proper and that it should be affirmed.

The Remaining Cross-Claims

When Interstate bought the property on which the canopy was later constructed, it assumed the obligations of its assignor pursuant to the terms of the sidetrack agreement of March 8, 1937 with Troy Union. The agreement made no reference whatever to New York Central or to its employees. Indeed, we are told Interstate knew of no relationship between Troy Union and New York Central nor of such arrangements as existed between the various railroads and Troy Union concerning the use of the Troy Union yard and tracks. The indemnity clause relied upon by New York Central, while in broad terms, runs in favor of Troy Union only.

The basis of the second cross-claim by New York Central is that, as Troy Union owned no engines or rolling stock of any kind, employed no conductors, engineers, foremen or brakemen, and had an arrangement with the New York Central, the Delaware & Hudson and the Boston & Maine, described as operating companies, pursuant to which they pay nothing for the privilege of operating on the Troy Union tracks but share in certain proportions 100% of Troy Union's expenses, therefore, it is argued by New York Central, there is to be implied in the agreement of March 8, 1937 a provision to the effect that New York Central and its employees are to be beneficiaries of the indemnity clause, although not named or referred to therein or elsewhere in the agreement.

The trial judge formulated another question for the jury, in an excess of caution, the purport of which is whether "the agreement or the circumstances surrounding its execution clearly express an intent that the New York

Central Railroad Company be entitled to enforce the provisions of the agreement against Interstate." The jury answered "No."

We think that on the record before us this was a question of law for the court and we find nothing in the New York cases to warrant a holding that the indemnity clause was intended to benefit the New York Central or its employees. See *Beveridge v. New York Elevated R.R.*, 1889, 112 N. Y. 1, 26, 19 N. E. 489; *Skinner Bros. Mfg. Co. v. Shevlin Engineering Co.*, N. Y. App. Div., 1st Dep't, 1931, 231 App. Div. 656, 248 N. Y. Supp. 380, affirmed 257 N. Y. 562, 178 N. E. 795. Moreover, *Rigney v. New York Central & Hudson River R.R.*, 1916, 217 N. Y. 31, 111 N. E. 226, and *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 1960, 364 U. S. 421, are both clearly distinguishable, and the latter concerns federal law only.

The arguments supporting the third cross-claim against Troy Union for failure to insist upon a broader indemnity clause for the benefit of New York Central and its employees is indeed, as said by Judge Foley, a "clutch at the last straw," and it has no merit whatever.

As all the cross-claims were properly dismissed, we need not concern ourselves with Troy Union's protective cross-appeal.

Affirmed.

FRIENDLY, Circuit Judge (concurring and dissenting):

I join in affirming Ratigan's judgment against the New York Central and the dismissal of the Central's second and third cross-claims, for the reasons stated by Judge Medina; as to the Central's first cross-claim I would grant a new trial.

We must assume the jury, which deliberated more than four hours, intended its answers to be consistent. It had

been instructed as to the difference between active and passive negligence—perhaps not, as my brother Medina observes, with pristine clarity, but in a way to which no one had objected and which sufficiently conveyed a distinction so inherently incapable of precise statement. One thing the jury had been unmistakably told: "The person or corporation guilty of active negligence has been characterized as a primary or principal wrongdoer responsible for his negligent act not only to the person injured, but also to one indirectly harmed by being cast in operation of law for the wrongful act." In the light of that instruction, the jury's answers to questions 7 and 8 reveal rather plainly who it thought should be held.

My brothers say the jury failed to accomplish its purpose because it gave an affirmative answer to question 5: "Did the method of operation by which the New York Central Railroad Company moved the car to its destination on the siding constitute negligence?" If question 5 must be read as limited to such a matter as kicking the car rather than moving it by the engine (and if we further assume there was sufficient evidence of that constituting negligence, which I doubt), the answer would be inconsistent with the answer to question 7 finding the Central guilty of passive negligence alone. But why must it be so read? For all I can see, the jury may have understood the question as including failure to give Ratigan proper notice of the proximity of the canopy, which would be only "passive" negligence if the railroad did not actually know of the canopy but merely ought to have known, *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463 (1952); *Ruping v. Great Atlantic & Pacific Tea Co.*, 283 App. Div. 204, 126 N. Y. S. 2d 687 (3d Dept. 1953); *Putvin v. Buffalo Elec. Co.*, 5 N. Y. 2d 447, 158 N. E. 2d 691 (1959). This seems all the more likely in view of the question asked by the jury, after two and a half hours, whether "the phrase 'method of operation' appearing in 5 and 6 cover all human and mechanical activities (including

verbal instructions) connected with moving the car to its destination, or is the phrase limited to mechanical operations?", and the judge's response "It is not restricted just to mechanical." On that view, which ought be adopted, if at all possible, in order to reconcile the answers, judgment should have been entered for the Central on its third party claim. If the District Judge was doubtful about this, as he might well have been, the jury could have been asked to clarify what it meant; or if his doubts did not crystallize until later, he could have directed a new trial on the Central's claim against Interstate. But I see no warrant for striking the jury's answers to questions 7 and 8 and then, on the basis of its answer to question 5, which, to say the least, is ambiguous, entering a judgment on the cross-claim quite evidently opposed to the result the jury intended and could permissibly have reached on the evidence.

F. R. Civ. Proc. 49(a), which is here applicable, contains no provision for the court's disregarding an answer, in the way that the penultimate sentence of 49(b) permits the court to disregard a general verdict "When the answers [to special interrogatories] are consistent with each other but one or more is inconsistent with the general verdict." The problem under 49(a) is more like that dealt with in the last sentence of 49(b) "When the answers are inconsistent with each other * * *"; there the Rule provides that "the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial." The evident sense of this is that when the answers are all consistent, a contrary general verdict may be disregarded as an aberration; but when the answers are inconsistent, disregard of any would be a denial of jury trial.

Despite this, my brothers say the answers to questions 7 and 8 may be disregarded because these ought not have been asked in the first place, since, in their view, the two latter questions do not relate to an "issue of fact." Whether Rule 49 uses "fact" in the limited sense which we have

held with respect to "findings of fact" in Rule 52(a), see *E. F. Drew & Co. v. Reinhard,* 170 F. 2d 679, 683-84 (2 Cir. 1948) and the cases as to negligence cited in *Romero v. Garcia & Diaz, Inc.,* 286 F. 2d 347, 355 (1961), cert. denied 365 U. S. 869 (1961), or in the broader sense of including mixed questions of law and fact, seems not to have been clearly decided—certainly the district courts in this circuit have not regarded themselves as confined to the former. Although statements in *Cate v. Good Bros., Inc.,* 181 F. 2d 146, 149 (3 Cir. 1950), cert. denied 340 U. S. 826 (1950), and in *Thedorf v. Lipsey,* 237 F. 2d 190, 193 (7 Cir. 1956), cited by Judge Foley and by my brother Medina, give some support to the former view, others say that a mixed question of law and fact may be put if the jury is properly instructed on the applicable legal standards, *Jackson v. King,* 223 F. 2d 714, 718 (5 Cir. 1955); *McDonnell v. Timmerman,* 269 F. 2d 54, 58 (8 Cir. 1959); *A. M. Webb & Co. v. Robert P. Miller Co.,* 78 F. Supp. 24, 27 (E. D. Pa. 1948), revd. on other grounds 176 F. 2d 678 (3 Cir. 1949); *McCandless v. DeFelice & Son, Inc.,* 144 F. Supp. 462, 464 (W. D. Pa. 1956). If it were necessary here to resolve the issue, I doubt that trial courts should be so hamstrung; to such extent as the device provided in Rule 49 has utility, and cases like this indicate the difficulties its use may create, the court should be able, in a complicated trial, to elicit the jury's view on "ultimate" issues and not merely on evidentiary ones. "The number and form of issues, if they present the case fairly, is a matter resting in the sound discretion of the trial judge." *Norfolk Southern Ry. Co. v. Davis Frozen Foods, Inc.,* 195 F. 2d 662, 666 (4 Cir. 1952), second appeal 204 F. 2d 839 (1953), cert. denied 346 U. S. 824 (1953). For that matter, if the rule be as narrow as my brothers think, question 5 also is not immune from criticism.

However, we are not required to decide that issue here. The *Cate* and *Thedorf* cases held merely that it was not error to submit only issues of fact without instructions as to their legal consequences—not that a party who has not objected to the submission of a mixed question of fact and law may have a disappointing answer disregarded and judgment entered in his favor as if the question had not been put. Here the jury gave its considered verdict that the Central was not guilty of active negligence and that Interstate was, after having been charged in the clearest terms what the consequences would be. Even if that answer was inconsistent with the answer to question 5, which I do not think it necessarily was, the only proper course, once the jury was discharged, was to order a new trial; neither the district court nor we are permitted to guess which of the two answers the jury would have altered if the alleged inconsistency had been promptly explained. The ruling of the district judge, now affirmed by my brothers, seems to me to deprive the Central of its right to a jury trial. See *Union Pacific R. Co. v. Bridal Veil Lumber Co.*, 219 F. 2d 825, 831-32 (9 Cir. 1955), cert. denied 350 U. S. 981 (1956).

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of June, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

FRANCIS T. RATIGAN,

Plaintiff-Appellee,

v.

NEW YORK CENTRAL RAILROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

INTERSTATE COMMODITIES, Inc.,

Third-Party Defendant-Appellee,

THE TROY UNION RAILROAD COMPANY,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees Francis T. Ratigan and Interstate Commodities, Inc.

A. DANIEL FUSARO,
Clerk.

Rule 49—Rules of Civil Procedure

"RULE 49. **Special Verdicts and Interrogatories**

"**(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

"**(b) General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 327 327

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

against

INTERSTATE COMMODITIES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

CARTER AND CONBOY,
Attorneys for Respondent,
By: SAMUEL GOTTESMAN,
Counsel,
100 William Street,
New York, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1961

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THE NEW YORK CENTRAL RAILROAD COMPANY,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Facts.

Sidetrack; Its Use and Inspection by the Petitioner and the Petitioner's Actual Knowledge of the Existence of the Canopy:

The canopy was erected in July, 1955 (73A-80A). The accident happened October 23, 1957, 3 A. M. (Central 15A, 23A, 44A). Within this 27-month period, the Central switch crews used the sidetrack five or six times weekly, without incident—a total of 812 times (72A).

During the two or three days the canopy was under construction in July, 1955, Central employees used the sidetrack delivering and removing cars and working along the main line, adjacent to the sidetrack. They observed the respondent's employees constructing the canopy and engaged them in conversation (79A-81A).

In the spring of 1957, an engineer and freight agent of the Central inspected the sidetrack and property of the respondent; made measurements of the clearance between the building and sidetrack for the purpose of determining the best manner to extend the sidetrack facilities (40A, 41A, 74A, 75A; Central 58A, 65A). Plans were prepared by the Central and submitted to the respondent (75A, Central 60A, 61A). A second inspection was made by the engineers (75A, Central 60A, 61A). One of the engineers who make the inspections was in charge of the operation and maintenance of the sidetracks (64A).

A Central representative daily checked the cars on the sidetrack in order to compute the demurrage charges on cars not promptly loaded or unloaded (74A).

The switching crew, of which Ratigan was a member, worked the night shift from April to October, 1957 (Central 16A). During this period they switched cars on the sidetrack four or five times a week—130 times, without incident (48A; 72A).

The Accident:

Conductor Bazar was in charge of and supervised the crew's work (45A, 47A, 56A; Central 40A). Plaintiff Ratigan knew that Bazar was the boss (45A, 47A).

The members of the night crew, of which Ratigan was a member, between April and October, 1957, never rode on top of a freight car being switched into or taken out of the Interstate siding (77A, 80A, 84A, 85A). Mr. Strang, a Cen-

tral conductor and brakeman who worked in and about the Troy yards for 35 years, testified that members of the switching crew never rode the top of a car while it was being "kicked" into or taken out of the Interstate siding (84A, 85A).

Visibility on the night of the accident was sufficiently clear so that plaintiff could see his way about the railroad yard without artificial illumination in the course of performing his duties (49A).

Bazar did not give any signal to Ratigan of his intention to brake the car, being switched into the siding; he made no effort to ascertain Ratigan's position (22A, 23A, 26A, 27A, 29A).

Ratigan did not give any signal to Bazar of his intention to brake the car (51A, 52A; Central 42A).

The lanterns they carried were intended to pass signals between them in the course of their work—intended to let each know what the other was doing (36A).

Bazar stood on the brake platform, located three feet below the top of the car (22A, 23A, 29A, 30A).

Ratigan walked along the 40-foot catwalk, carrying a lighted lantern. When he reached the end of the freight car, he knelt on both knees and was about to put his foot on the top rung of the ladder when the accident happened (34A, 35A; Central 37A).

Bazar did not see Ratigan at any time as he walked along the catwalk. After Ratigan had completed walking the length of the car, Bazar saw him at the instant that he set his lamp down on the top of the car (Central 45, 47). At that moment Bazar saw Ratigan, and he was about to say to him, "What are you doing here," when Ratigan toppled over (Central 23A; 35A).

As Ratigan walked along the top of the car, he clearly saw the outlines of the catwalk (49A). He was able to plainly see other portions of the top of the car (49A). He did not see Bazar at any time prior to the accident (50A).

The ordinary and usual method for delivering a loaded car into a sidetrack was by delivering it while still coupled to the engine (33A, 72A).

The Central had a Safety Bureau in the division embracing the Troy yard. Its practice and custom was to make periodic inspections of its right of way and all sidetracks. Safety Bureau personnel would make written inspection reports (69A). The Central did not swear any Safety Bureau representatives and did not offer in evidence any of their reports concerning the inspections of the Interstate sidetrack (T330).

Interstate had notified the Central that all operations at its siding should be completed before 9 P. M. daily. This notice was given to Central's Traffic Manager Grimes in May, 1957, and he agreed to comply with that request (77A).

Interstate's Acquisition of the Sidetrack:

Prior to 1949, Interstate acted as a commission broker in Albany, New York, and had no direct experience with railroad sidings (Central 63A). All merchandise it sold was shipped by manufacturers direct to Interstate's customers (71A).

In March, 1950, Interstate purchased a building on the south side of Madison Street, Troy, New York, adjacent to Troy Union's right of way (37A; Central 31A). This purchase included an adjacent railroad siding. In this transfer a sidetrack agreement (Defendant's Exhibit A) between Finger Lakes and Hudson Flour Mills, Inc., and Troy Union, dated March 8, 1937, was assigned, with Troy Union's consent, and delivered to Interstate (71A).

Interstate had no dealings with Troy Union prior to, or at the time of, its purchase of the Madison Street property. No railroad companies were represented at the transfer (72A). Nothing was said about any other railroads purporting to have any interest or rights under the sidetrack agreement (72A; T367). Nothing was said about any relationship between Troy Union and the Central (72A).

Prior to the trial of this action, Interstate knew of no relationship between Troy Union and the Central (72A; T367). Nor did it have any knowledge relating to the terms under which various railroads used the Troy yards (72A; T367).

The Reasons Why the Application for the Writ Should be Denied.

1. The answers to questions "3," "4," "5," and "6," factually establish acts of commission negligently performed by the Central. Such acts are active negligence as a matter of law *(Putvin v. Buffalo Electric Co.,* 5 N. Y. 2d 447 [1959]; *Bush Terminal Buildings Co. v. Luchenback Steamship Co.,* 9 N. Y. 2d 426, Advance Sheet #277 5-17-61).

> "* * * we could not view the Railroad's conduct in pushing the car ridden by the interstate past the post * * * as negligence less active than that of the Lumber Company" (*Dery v. Wyer,* 265 F. 2d 804, 2nd Cir. 1959).

> "There is much in the evidence as to the delinquency of the Railroad, which alone selected the time and place and was in complete charge and control of the sidetrack movement, to warrant a conclusion of active negligence. The admitted fumbling of instructions and the manner in which the move was made, which resulted in two men on the top of the boxcar where one should have been, is sufficient to support the answers to Questions '5' and '6' that the method of operation was negligent and proximately caused the accident and injury" (Judge Foley's opinion, Central Appendix, 9A).

An actively negligent tort-feasor is not entitled to common-law indemnity. *Tipaldi v. Riverside Memorial Chapel,* 273 App. Div. 414 (1948), affirmed 298 N. Y. 686, 82 N. E. 2d 585; *Guarnieri v. Kewanee-Ross Corp.,* 270 F. 2d 575, 2nd Cir. 1959.

2. The jury having passed upon the facts relating to "method of operation," it was not within their province to characterize those findings as passive.

Without objection, the Court defined the phrase "method of operation." This became the law of the case (*Imbrey v. Prudential Insurance Co.,* 286 N. Y. 434 [1941]).

Question "7" did not present any factual issue for the jury to determine.

The moment the jury answered questions "5" and "6" as it did, the question whether the Central's causally related faults of commission constituted active or passive negligence became a question of law for the Court and ceased to be a question of fact for the jury. Accordingly, to the extent that finding "7" may relate to the Central's faults of commission and label them "passive," it is not a finding of fact.

This case would be in precisely the same posture had the jury not answered question "7." Having found the Central guilty of causally related faults of commission, the jury had made the dispositive factual findings which then required the Court to direct entry of judgment dismissing the first cause of action.

As a mechanical matter, when question "7" was submitted, the Court might properly have prefaced it with the instruction to answer it only if the jury answered "No" to questions "5" and "6."

United States District Judge Foley treated question number "7" and the answer thereto as mere surplusage in view of the affirmative answers to questions "5" and "6" (Central 10A). The majority opinion of the Circuit Court of Appeals agreed with this ruling (Application, p. 22).

3. The language of Subdivision "a" of Rule 49 is clear and unambiguous—there is no substantial conflict among the various Circuits in their judicial interpretation of the subdivision.

> "The formulation of issues, however, is a matter resting in the sound discretion of the Trial Judge * * *. The number and form of issues, if they present the case fairly, is a matter resting in the sound discretion of the Trial Judge. Rule 49A of the Rules of Civil Procedure, 28 U. S. C. A.; *Mourikas v. Vardianos*, 4th Cir., 169 Fed. 2d 53, 57; Moore Federal Practice, 2nd Edition, Vol. 5, page 2206" (*Norfolk Southern Railway Co. v. Davis Frozen Foods*, 4th Cir. 1952, 195 Fed. 2d 662, 2nd appeal, 4th Cir., 204 Fed. 2d 839, certiorari denied, 1953, 346 U. S. 824, 74 Supreme Court 41).

Interrogatories must present only questions of fact for a jury to determine (*Carpenter v. Baltimore & Ohio Railroad*, 109 Fed. 2d 375 [1940]).

The procedure under 49a leaves to the Trial Judge the responsibility of applying appropriate legal principles to the facts found by the jury.

The Trial Judge reserves a large measure of control over the judgment to be entered, in the interest of substantial justice between the parties (*Momand v. Universal Film Exchange*, D. C. D. Mass., 1947, 72 F. Supp. 469, 485; *Halprin v. Mora*, 3 Cir. 1956, 231 F. 2d 197).

A special verdict is where the jury finds the facts of the case, and refer the decision of the cause upon those facts to the Court (*Sugdam v. Williamson*, 61 U. S. 427; *New Orleans Ins. Assoc. v. Piaggio*, 83 U. S. 378 [1873]).

The Judge has the responsibility to apply appropriate legal principles to the facts found by the jury (*Cato v. Good Bros., Inc.*, 3rd Cir. 1950, 181 F. 2d 146; *Thedorf v. Lipsey*, 7th Cir. 1956, 237 F. 2d 190; 5 Moore's Federal Practice, 2nd Edition 2204).

4. The Trial Court correctly dismissed the second cause of action because a beneficial intent is not, as it is required to be, clearly found in the sidetrack agreement (*Beveridge v. N. Y. Elevated Railroad Co.*, 112 N. Y. 1, 1889; *Skinner Bros. Manufacturing Co., Inc., v. Shevlin E. Co., Inc.*, 231 App. Div. 656, 658-659, 248 N. Y. S. 380, 382 [1st Dept. 1931], aff'd without opinion 257 N. Y. 562 [1931]; see also *Restatement, Contracts,* Section 133, reciting that the intention to confer benefit on a third-party must appear "FROM THE TERMS OF THE AGREEMENT").

The sidetrack agreement (Defendant's Exhibit A) discloses no intent to indemnify any party but Troy Union. It says, "The Industry shall * * * indemnify and hold harmless the Railroad Company * * *." It does NOT say, "The Industry shall * * * indemnify and hold harmless the Railroad Company and its licensees."

In fact, the agreement is on a printed form which contains the name, "The New York Central Railroad Company (hereinafter called the Railroad Company), party of the first part." From this, "New York Central" was stricken and "Troy Union" inserted. Clearly, if this agreement was intended to inure to the benefit of the Central, its name could easily have been left in the agreement, and Troy Union's inserted as an additional party. This was not done. The agreement, as prepared, is limited to Troy Union as the Railroad and The Finger Lakes and Hudson Flour Mills, Inc., as the Industry. The requirement that the beneficial intent be "clearly found in the agreement" is NOT met.

In this vital respect, the agreement is unlike the usual municipal construction contract, expressly reciting, in clear terms, the contractor's obligation to compensate members of the public injured by reason of construction. *Rigney v. N. Y. C. & H. R. R. Co.*, 217 N. Y. 31, 37 (1916), and *Coley v. Cohen*, 258 App. Div. 292 (4th Dept. 1939), are typical of that line of cases.

Any intention to benefit the Central could certainly have been expressed in few words. Because no such intent appears, the Central is not a third-party beneficiary of the sidetrack agreement, and its second cause of action against Interstate was properly dismissed as a matter of law.

The application for the writ should be denied.

Dated: August 30, 1961.

Respectfully submitted,

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